"I propose to give no opinion upon the true construction of the statute, except this: that a condition precedent to the invocation of the arbitrator on whatever grounds is that a difference between the parties should have arisen; and I think that must mean a difference of opinion before the action is launched either by formal plaint in the county court or by writ in the superior courts. Any contention that the parties could, when they are sued for the price of the services, raise then for the first time the question whether or not the charges were reasonable and that therefore they have a right to go to an arbitrator, seems to me to be absolutely untenable."

And Lord Ludlow summarised the matter as follows (at p. 82):—

"this difference is a difference which ought to have arisen before action brought, and that it is too late afterwards to raise a difference which can be brought within the meaning of this section. It is sufficient for the purpose of this case to say that it is concluded by the finding of the county court judge. As I understood that finding (and it is final), it is that there was no difference existing between the parties at the time the action was brought."

In the present case, however, it is difficult to see how it can be said that there is no dispute in connection with the agreement between the parties and that the arbitration clause is a term of that agreement. Under and by reason of the agreement there is an obligation on the contractor to do certain work and an obligation on the employer to pay for it. On the material before us what the contractor has sued to enforce is the employer's obligation to pay which arises from that agreement. He has not mentioned the agreement in terms in his statement of claim as endorsed on the writ but the employer has said in his affidavit that if there is any obligation it is under the agreement and that has not been denied; the contractor has not said for instance that he is suing on a *quantum meruit* or to enforce any other sort of obligation that does not arise from the agreement or anything of the sort. The employer says he has a good defence, that is, he says he is subject to no obligation under the agreement which can be enforced against him. In the circumstances how can it be said that there is no dispute in connection with the agreement?

I would allow the appeal with costs.

Pike C.J. (Borneo): I agree with the judgment of the learned Lord President which I have had the opportunity of reading. I would but add that in my opinion not only must the arbitration clause be considered in the light of the statutory provisions referred to by the learned Lord President in his judgment but it must also be considered in the context of the agreement as a whole, clause 3 of which seems clearly to indicate an intention at the time of execution to include an arbitration clause in that it confers on the arbitrator mentioned in the condition a specific duty in relation to the appointment of new architects should such an appointment become necessary and should the parties be unable to agree as to the appointment.

Gill J.: I have had the benefit of reading the judgment of the Lord President in this appeal.

I agree that this appeal should be allowed with costs.

Appeal allowed.

JAYAS v. PUBLIC PROSECUTOR

[A.Cr.J. (Azmi J.) February 24, 1966]

[Johore Bahru — Criminal Appeal No. 17 of 1965]

Road Traffic — Insurance — Using a vehicle without 3rd party risk insurance — Appellant an employee — Necessity to produce evidence — Road Traffic Ordinance, 1958, s. 74(3).

The appellant had been convicted for using a vehicle without a valid carriers' licence and without third party insurance. He was fined $20 on the first charge and $50 on the second charge and was also ordered to be disqualified for 12 months. He appealed on the ground that the sentence was excessive. On appeal it was stated that the appellant was an employee but no evidence was produced at the trial to this effect.

Held: where a person wishes to rely on the proviso to subsection (3) of section 74 of the Road Traffic Ordinance he must produce evidence to show that the vehicle does not belong to him, that he is an employee and had no knowledge that a policy of insurance was not in force; and magistrates should draw the attention of persons unrepresented by counsel to the provisions of the proviso.

CRIMINAL APPEAL.

G. Murugaiyan for the appellant.

Tungku Zaid bin Tungku Zakaria (Deputy Public Prosecutor) for the respondent).

Azmi J.: The accused was convicted on the following two charges:

"1st Charge:

That you on the 29th day of May, 1965 at about 12.45 p.m. at Jalan Scudai, Johore Bahru, in the State of Johore, being the driver of motor van No. T. 5897, did use the said vehicle for the carriage of goods without a valid carrier's licence, and that you thereby committed an offence punishable under section 98(1) of the Road Traffic Ordinance No. 49 of 1958.

2nd Charge:

That you on the same date, time and place, in the State of Johore, did use motor van No. T. 5897 without there being enforced in relation to the user of the said vehicle such a policy of Insurance of Third Party Risk, and that you thereby committed an offence under section 74 (1) punishable under section 74(2) of the Road Traffic Ordinance No. 49 of 1958."

by the learned magistrate at Johore Bahru and was fined $20 on the first charge and $50 on the second charge and was also ordered to be disqualified from holding or obtaining a driving licence for Class 'D' vehicles for 12 months under section 74(2). The appeal was against sentence and the ground of appeal says as follows:

"The sentence is manifestly excessive."

At the hearing of the appeal the learned defence counsel referred me to section 74(3) of the Road Traffic Ordinance, 1958. That subsection and the proviso read as follows:

"(3) A person disqualified by virtue of a conviction under this section or of an order made thereunder for holding or obtaining a driving licence shall, for the purposes of Part II of this Ordinance, be deemed to be disqualified by virtue of a conviction under the provisions of that Part:

Provided that a person shall not be convicted of an offence against this section if he proves —

(a) that the vehicle did not belong to him and was not in his possession under a contract of hiring or loan; and

(b) that he was using such vehicle in the course of his employment; and

(c) that he neither knew, nor had reason to believe that there was not in force in relation to such user a policy of insurance or such security as complies with the provisions of this Part."

According to the defence counsel in this particular case the appellant was only an employee and the vehicle did not belong to him nor was it in his possession under a contract of hiring or loan; and if he could have satisfied the court that he neither knew nor had reason to believe that there was no insurance policy, he could not have been convicted under the two charges.

There was nothing on record to show any of the above things, so I have declined to interfere with the acceptance of the plea of guilty by the learned magistrate. The appellant was not represented by a counsel at the trial.

I would, therefore, suggest that in future all magistrates bring to the notice of persons who are brought before them and charged under section 74, and who are not represented by counsel, the provisions of the proviso. If the accused could prove or is in a position to prove all those things stated in the proviso, then no doubt in my view the proper person to be charged would be the owner and employer of the driver since a person who causes or permits another person to use such motor vehicle also commits an offence under the section. In such circumstances no doubt the magistrate could consider appropriate punishments, something heavier than a mere fine of $50. I think everyone is aware of the reasons for the provisions requiring that motor vehicles be insured against third party risks, namely to protect the rights of persons injured or dependants of deceased persons killed in motor vehicle accidents. The failure on the part of the owner of a motor vehicle to take out an adequate insurance against third party risks would deprive such injured persons or dependants of deceased persons of the right to adequate compensation under the law.

I would direct that this judgment be sent out to all presidents and magistrates in Johore for their information.

Order accordingly.

CHENG KENG HONG v. GOVERNMENT OF THE FEDERATION OF MALAYA

[O.C.J. (Raja Azlan Shah J.) February 28, 1966]

[K.L. — Originating Summons No. 39 of 1965]

Contract — Tender — Acceptance of tender — Whether principal bound by representations of agent — Trade usage — Powers of arbitrator — Contracts (Malay States) Ordinance, 1950 — Evidence Ordinance, 1950, s. 92.

In this case the Chief Architect of the Ministry of Education had issued a notice inviting tenders for the erection of a school. The applicant tendered for the work and his tender was accepted. A contract was entered into which recited the drawings and specifications according to which the work was to be done. The applicant discovered that the specification for electrical service was at variance with the layout drawings and thereupon wrote to the Chief Architect. He received a letter from a Mr. Hewish for the Chief Architect that extra payment would be paid for fittings, other than those mentioned in the specifications. Mr. Hewish was an architect appointed to supervise the work. Subsequently the Government refused to pay any extra payment and the matter was referred to arbitration. Clause 40 of the contract provided for arbitration and stated that the arbitrator should have power to review and revise any certificate, opinion, decision, requisition or notice and to determine all matters in dispute submitted to him in the same manner as if no such certificate. opinion, decision, requisition or notice had been given. The arbitrator found that the applicant was justified in assuming that Mr. Hewish had authority to act for the Government but held that he could go behind the letter of Hewish and hold that the applicant was not entitled to extra payment. The arbitrator referred the following two questions to the court — (1) whether the letter signed by Mr. Hewish is binding on the respondents and/or gives rise to an estoppel whereby the respondents are precluded from disputing the authority of Mr. Hewish; (2) in the event that question (1) be answered in the affirmative whether the arbitrator was entitled under clause 40 of the contract to review the letter itself and to hold that the decision contained in the letter was wrong in principle and that no extra payment should be made to the applicant for the fittings in question.

Held: (1) although Mr. Hewish had no authority to sign the letter for the Chief Architect, the respondents had by their conduct represented or permitted to be represented to the applicant that Mr. Hewish had the authority to act on their behalf and consequently the respondents were bound by their acts to the same extent as if he had the authority; therefore in the circumstances the respondents were estopped from disputing the authority of Mr. Hewish;

(2) the arbitrator had power to review the letter under clause 40 of the contract and that in the circumstances of this case the arbitrator was justified in going behind the letter and holding that the decision to pay the extra payment for the electrical fittings was wrong;

(3) there was no custom as alleged that if any work was done according to the drawings which was not set out in the specification, extra payment would be made, as such usage would be inconsistent with the contract, which consists of the tender, acceptance and other relevant documents.